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Introduction to Swiss Law

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Constitutional Law

I. Constitution

The Swiss Constitution in force today was introduced as recently as the year 2000. However, Switzerland's Constitution has experienced a lengthy history of adaptation and revision. The first section of this chapter examines the history behind the Constitution (1.), before outlining key concepts which are encompassed in its text, like the concept of citizenship (2), the protection of fundamental rights (3.), the allocation of powers between the federation, the cantons and the communes (4.) and the allocation of powers between the three branches of government on the federal level (5.).

1. History and Overview

Until 1848, the ancient Swiss cantons together formed a rather loose confederation. The cantons themselves were sovereign states, tied together by treaties. A typical example of such a treaty was the Confederate Treaty of 1815. This was an agreement between the cantons to define a Swiss confederation, agreed by the cantons under pressure from the then predominant European powers during the reorganisation of Europe at the Congress of Vienna. Simultaneously, at this Congress, the other European states recognised the borders of the Swiss confederation and its neutrality. In 1847, a civil war broke out in which the (predominantly liberal) Protestant cantons fought against the (predominantly conservative) Catholic cantons. The conflict erupted after the Catholic cantons founded the *Sonderbund* ("separate alliance"); the Protestant cantons considered this alliance as violating the Confederate Treaty. The Protestant cantons prevailed, and the *Sonderbund* was dissolved.

In the aftermath of this civil war, the Switzerland we know today was founded. In 1848, the new Constitution was put into force, although various cantons – mainly the Catholic ones which had been defeated in the civil war – originally opposed its content as well as the creation of a new federation. The new Constitution created a modern federal state, whereby enumerated policy areas fell under the competence of the federal level, leaving the

regulation of all other policy areas to the then 25 cantons. It strengthened democratic structures and fundamental rights. It also introduced the organisational system of checks and balances on the federal level through the establishment of three separate branches of government: the Federal Assembly (the legislative branch), the Federal Council (the executive branch) and the Federal Supreme Court (the judicial branch). In part, the new Constitution was visibly inspired by the US Constitution and the achievements of the French revolution.[1]

In 1874, the Constitution of 1848 was subjected to a complete revision. A major novelty was the introduction of the optional legislative referendum; citizens could request a binding vote on federal acts which the parliament planned to enact. Further, it was this revision that established the Federal Supreme Court as a permanent court. The army was unified; no longer did each canton have its own army. New fundamental rights such as economic freedom and the right to free primary school education were introduced. Other rights were extended, such as the right of domicile.

Between 1874 and 1999, the Constitution was revised many times. As this occurred, the competences of the federal level were gradually enhanced. Moreover, the elements of direct democracy became more pronounced: in 1891, the right of the citizens to propose a revision of the Constitution was introduced. A further development was the creation of the 26th canton: in 1978, the Canton of Jura was founded. And eventually, as late as 1971, women were granted full political rights in federal matters (although some cantons took longer to guarantee the same right).[2]

In 1999, the Constitution was again completely revised. The prime objective of this total overhaul was to update and improve the text, without making any substantial changes. The new text was put into force in 2000, after a majority of the people (59 % of those who voted) and a majority of the cantons (12 cantons, two half-cantons) approved it.[3] It contains all the elements which are typical of a federal state's modern Constitution (short of providing for the constitutional review of federal acts):

1 Thomas Fleiner/Alexander Misic/Nicole Töpperwien, Constitutional Law in Switzerland, 2nd edition, Alphen aan den Rijn 2012, n. 13; Walter Haller, The Swiss Constitution in a Comparative Context, 2nd edition, Zurich/St. Gallen 2016, n. 2, n. 20 et. seq.

2 See below, pp. 159.

3 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Swiss Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

- Title 1 (Articles 1–6 Constitution) defines the main features of the Swiss confederation. It provides a list of the 26 cantons, which, together with the people, form the confederation itself. It also sets out the aims of the Swiss confederation, in particular the objectives of protecting the rights and liberties of the people and safeguarding the independence and security of the country. This part also sets out the national languages of Switzerland as being German (the first language of 63.5 % of the population), French (22.5 %), Italian (8 %) and Romansh (0.5 %). Finally, this Title highlights the importance of the rule of law.
- Title 2 (Articles 7–41 Constitution) lists the fundamental rights that apply in Switzerland and defines the requirements for Swiss citizenship.
- Title 3 (Articles 42–135 Constitution) distinguishes the competences of the federation from the competences of the cantons and communes, by enumerating the competences which the federal level possesses. It also defines the financial system, including the rules on taxation. This section is by far the most voluminous, encompassing 104 articles.
- Title 4 (Articles 136–142 Constitution) grants political rights in federal matters. In particular, it grants the right to participate in elections to the National Council and in popular votes (initiatives and referenda), as well as the right to launch or sign popular initiatives and requests for referenda.
- Title 5 (Articles 143–191c Constitution) regulates the organisation and competences of the main federal authorities: namely, the Federal Assembly, the Federal Council and the federal administration, the Federal Supreme Court and the other judicial authorities.
- Title 6 (Articles 192–197 Constitution) sets out the procedure for the revision of the Constitution. One key requirement is that the people *and* the cantons must agree on any proposed revision. A revision can be initiated by the federal authorities or the people (popular initiative). Title 6 also contains transitional provisions.

In addition to the relevance of the Constitution itself, constitutional law and practice in Switzerland is influenced by international law, which often encompasses rules of constitutional relevance. A prime example of this is the influence of international human rights guarantees, as well as some of the bilateral agreements that Switzerland has concluded with the EU. Interpreting Swiss law, including the Constitution, in conformity with international law

is a well-established method of interpretation, supplementing the classical canon of methods of interpretation. However, although Switzerland as a country has traditionally taken a friendly, inclusive approach towards international law, the Constitution continues to follow the introverted tradition of constitutionalism and fails to properly reflect Switzerland's participation in global and European organisations and treaty networks.[4]

2. People

Switzerland has 8'400'000 inhabitants. 6'300'000 of these inhabitants are Swiss citizens. The others – *i.e.* 25 % of the population – are foreign nationals (not including asylum seekers); a very significant proportion. Moreover, more than 300'000 persons commute across the borders to and from Switzerland, often on a daily basis. 770'000 Swiss citizens live abroad.

a) Citizenship

Citizenship in Switzerland is based on the concept that a citizen has three citizenships: communal, cantonal, and Swiss (Article 37 Constitution). These citizenships are connected: in particular, cantonal and communal citizenships are prerequisites of Swiss citizenship. It is permitted to have dual citizenship under Swiss law, *i.e.* to possess Swiss citizenship in addition to the citizenship of another country.

Citizenship can be acquired by law or by naturalisation. The prerequisites for the acquisition are defined partly by federal law (which mainly just lays out the minimum requirements) and partly by cantonal law (Article 38 Constitution). With respect to federal law, the Federal Act on Swiss Citizenship (Swiss Citizenship Act) is relevant:

– Swiss citizenship is acquired by law, i.e. automatically, by children who have one parent with Swiss citizenship (Article 1 Swiss Citizenship Act).[5] These children also attain the Swiss parent's cantonal and communal citizenship (Article 2 Swiss Citizenship Act).

4 See the chapter on International Relations, pp. 163.

5 Federal Act on Swiss Citizenship of 20 June 2014 (Swiss Citizenship Act, SCA), SR 141.0; see for an English version of the Swiss Citizenship Act www.admin.ch (https://perma.cc/GHN5-HV6Y).

Thereby, Switzerland follows the principle of *ius sanguinis*. A child who is adopted will also acquire Swiss citizenship, from the adopting Swiss parent (Article 4 Swiss Citizenship Act).

– Swiss citizenship is acquired by naturalisation, i.e. by an official decree, when an applicant fulfils the relevant requirements stipulated by federal and cantonal law (Articles 9–19 Swiss Citizenship Act). With respect to federal law, the requirements are that an applicant must demonstrate that he or she has been successfully integrated into the Swiss society (requiring, inter alia, to respect the values of the Swiss Constitution and to be able to communicate in one of the national languages), is accustomed to the Swiss way of life and does not endanger the internal or external security of Switzerland, and that he or she has resided in Switzerland for a certain period of time (ten years for adults). For cantons to approve naturalisation, which is also necessary for Swiss citizenship, it is usually required that an applicant speaks one of the canton's official languages and that he or she has resided in the canton and commune for a certain period of time (which shall not exceed five years according to Article 18 Swiss Citizenship Act). In various cantons, the decision to grant citizenship has traditionally been taken by communal assemblies or, even more problematically in terms of affording sufficient respect to such individuals' fundamental rights, by the electorate in secret ballot votes.[6] A simplified procedure for naturalisation applies to certain foreign nationals, in particular to spouses of Swiss citizens. In 2017, the people and the cantons voted in favour of a new constitutional provision which mandates that the federal authorities shall enact simplified regulations on the naturalisation of third generation immigrants (Article 38 III Constitution).

Swiss citizenship is the prerequisite for various rights and duties. On the federal level, the following are the most relevant:

– Swiss citizens over the age of 18 enjoy numerous political rights. They have the right to participate in elections to the National Council and in popular votes (initiatives and referenda) and to launch or sign initiatives and requests for referenda (Article 136 Constitution). Swiss citizens benefit from the freedom of domicile in Switzerland (Article 24 Constitution),

6 See pp. 160.

from the protection against expulsion, extradition and deportation (Article 25 Constitution) and from diplomatic protection abroad.
– Swiss men have a duty to render military service. For women, military service is possible but voluntary (Article 59 Constitution).

Swiss citizenship can be lost by law, i.e. automatically, or by official decree. It is lost by law, for instance, when a Swiss citizen was born and has lived abroad, possesses another citizenship and does not declare that he or she wants to maintain the Swiss citizenship by the time he or she reaches the age of 26 (Article 7 Swiss Citizenship Act). It is lost by an official decree, for instance, when a Swiss citizen who also possesses another citizenship seriously violates the interests or reputation of Switzerland (Article 42 Swiss Citizenship Act). These rules are adherent to the international principle that statelessness shall be avoided.

b) Foreign Nationals

As briefly mentioned above, Switzerland has traditionally been a country with a high percentage of people who live and work in the country but do not possess Swiss citizenship. Various factors might explain this. Firstly, the economic prosperity of the country has led to a high demand for manpower from abroad. Moreover, the fact that EU citizens in Switzerland enjoy substantial rights based on the Agreement on the Free Movement of Persons between Switzerland and the EU reduces the incentive for such people to be naturalised. Finally, the restrictive naturalisation policy in Switzerland means that even persons who have lived in the country for decades may not necessarily meet the requirements for naturalisation.

Article 121 Constitution confers the legislative competence for matters of immigration and asylum to the federal authorities. Based upon this conferral, the Federal Act on Foreigners regulates entry to, residence in and departure from the country.

Over the last few decades, various popular initiatives have aimed at forcing the federal authorities to implement a more restrictive policy vis-à-vis foreign nationals.[7] For example, in 2010, the people and the cantons approved the initiative "for the expulsion of criminal foreign nationals" ("Für die Ausschaffung krimineller Ausländer"). This initiative stated that foreign nationals who commit one of the enumerated crimes – such as homicide, rape

7 See for popular initiatives in general pp. 151.

and robbery – or even those who have improperly claimed social insurance or social assistance benefits will lose the right of residence automatically and must be deported (Article 121 III-VI Constitution). The Federal Assembly did not implement the initiative literally as such an implementation would have been incompatible with international law guarantees; in particular, it included a hardship clause – a clause which allows for flexibility to be applied when the expulsion would result in a severe personal hardship and the private interests of the foreign national to stay in Switzerland prevail over the public interests to expulse him or her. In response to this legislation, another popular initiative was launched; it was entitled "enforcing the expulsion of criminal foreign nationals" ("Zur Durchsetzung der Ausschaffung krimineller Ausländer") and demanded a strict implementation of the original initiative. However, the people and the cantons rejected this call for strict implementation in 2016. Another popular initiative dealing with immigration was entitled "against mass immigration" ("Gegen Masseneinwanderung") and was approved by the people and cantons in 2014. This initiative stipulates that Switzerland shall control the immigration of foreign nationals autonomously, by introducing annual quotas and granting Swiss citizens priority on the job market (Articles 121*a* and 197 No 11 Constitution). These provisions, read together, are obviously directed against the Agreement on the Free Movement of Persons between the EU and Switzerland, although they do not explicitly refer to this agreement, let alone mandate the government to terminate it. The Federal Assembly decided to implement the initiative in a way that ensured it would not violate the Agreement on the Free Movement of Persons.[8]

Foreign nationals do not enjoy political rights on the federal level. This is problematic, because these people – 25 % of the population, paying taxes as Swiss citizens do – are henceforth excluded from the democratic process. It should be noted, however, that some cantons and communes do grant political rights to foreign nationals. For example, the cantons of Jura and Neuchâtel grant foreign nationals, under certain conditions, the right to vote at cantonal and communal levels.

8 See the chapter on International Relations, p. 177.

3. Fundamental Rights

The Constitution contains an impressive catalogue of fundamental rights, starting with human dignity and followed by all the rights which are usually found in modern European constitutions: equality before the law; the prohibition of discrimination on the grounds of, inter alia, origin, race, gender and age; the protection against arbitrariness; protection of good faith; civil liberties and freedoms; political rights; basic procedural rights and basic social rights (Articles 7–34 Constitution).

Article 35 Constitution mandates that fundamental rights must be respected throughout the entire legal system. Individuals can invoke them against state authorities. Further, private persons are bound by fundamental rights when they exercise a state function. Finally, fundamental rights must be taken into account by the state, where appropriate, in regulating relationships between individuals. This includes the obligation to draft new laws, and interpret existing laws, in light of fundamental rights (so-called indirect third-party effect). For instance, marriage and family law is to be shaped and interpreted in light of the right to marry and to have a family (Article 14 Constitution). Article 36 Constitution makes it clear that guaranteed rights do not apply in an absolute manner. Restrictions are lawful as long as they fulfil all of the following conditions: they have a legal basis, are justified by a public interest, are proportionate and do not violate the essence of the right in question.

In addition to the federal Constitution, fundamental rights are guaranteed in cantonal constitutions and in international treaties:

- The constitutions of the cantons also contain fundamental rights. In some cases, they go beyond what is guaranteed by the federal Constitution. For instance, the Constitution of the Canton of Zurich guarantees, in Article 15, the right to found, to organise and to attend private educational institutions.
- International treaties are highly relevant for the protection of fundamental rights in Switzerland. First and foremost, the European Convention on Human Rights (ECHR) has been attributed a quasi-constitutional status by the Federal Supreme Court.[9] Other international treaties complement the protection guaranteed by the ECHR, such as the UN Covenant on Economic, Social and Cultural Rights,

9 BGE 117 Ib 367.

the UN Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination. Moreover, the comparative law method of interpretation has traditionally been instrumental in further developing fundamental rights in Switzerland; in particular, law and practice in Germany, the United States and the EU has markedly influenced developments in the protection of fundamental rights in Switzerland.

The Federal Supreme Court has not hesitated to recognise fundamental rights which were not explicitly provided for in the Constitution of 1848 or 1874, thereby recognising the existence and enforceability of unwritten rights. Examples include freedom of expression (now Article 16 Constitution), freedom of assembly (now Article 22 Constitution) and the right to assistance when in need (now Article 12 Constitution).[10] It is conceivable that in the future the Federal Supreme Court might again recognise guarantees which are not (yet) enshrined in the Constitution, if such a step appears prudent in light of new challenges and threats.

Individuals can directly invoke fundamental rights which are guaranteed by the federal Constitution before administrative authorities and courts. For example, this can be done in cases where cantonal laws and decisions are being reviewed. Similarly, it is possible to challenge decisions based on federal ordinances as to their compatibility with fundamental rights. However, the limit to this review comes in the form of Article 190 Constitution, which mandates that the Federal Supreme Court and the other judicial authorities apply federal acts and international law. This precludes any possibility for the courts to declare federal acts invalid if they are shown to be incompatible with fundamental rights guaranteed by the federal Constitution.[11]

4. Federation, Cantons, Communes

Federalism is a basic constitutional principle in Switzerland. The competences and responsibilities are vertically distributed over the three levels of government, namely the federation, the cantons and the communes (municipalities).

10 BGE 87 I 114; BGE 96 I 219; BGE 121 I 367.

11 See pp. 156.

The latter enjoy considerable autonomy in regulating their own affairs, profiting from the principle of subsidiarity (Article 5*a* Constitution), which dictates that the Confederation only interferes with regulation if the cantons or communes are unable to regulate a particular matter themselves. It is partly thanks to this arrangement that the identity-creating societal, linguistic and cultural diversity throughout the country is preserved. The people are also encouraged to actively participate in political debates and decision-making on the cantonal and communal level. Further, the federal bicameral parliamentary system ensures that the cantons participate in the law-making process on the federal level.[12] They are also involved in the process of revising the federal Constitution; a revision must not only be approved of by a majority of the people but also by a majority of the cantons.

Overall, the above arrangements ensure that the Swiss federal system displays a unique "bottom-up" character.[13] Simultaneously, however, it is acknowledged that the federal level and the cantons shall cooperate and support each other in the fulfilment of their duties (Article 44 Constitution). An essential element in achieving this goal is the use of national equalisation payments, both between the individual cantons and between the federation and the cantons. These payments contribute to the promotion of internal cohesion (Article 2 II Constitution). In 2017, they amounted to almost CHF 5 billion.[14]

The following paragraphs describe characteristic features of the three levels of government:

– The federation is composed of both the people and the cantons (Article 1 Constitution). The federal level enjoys the competences which are assigned to it by the Constitution (Article 42 Constitution). They are enumerated largely in Articles 54–125 Constitution. Federal law takes precedence over cantonal and communal law (Article 49 Constitution). This remains the case even where the Federal Assembly passes acts which, according to the Constitution, are not within its competence.[15]

12 See pp. 148.

13 Haller, n. 92; s. also Fleiner/Misic/Töpperwien, n. 289.

14 Federal Department of Finance, Factsheet: National Fiscal Equalization (NFA), 2017 (https://perma.cc/YJE2-SGE5).

15 See pp. 156 for the lack of constitutional review of federal acts.

- The second level of government is formed by the 26 Cantons (23 cantons, six half-cantons).[16] As mentioned, it was the Canton of Jura that became the 26th canton in 1978; its territory had formerly been part of the Canton of Bern. Attempts to merge the two half-cantons of Basel Stadt and Basel Landschaft into one canton have been unsuccessful; in 2014, the people of Basel Stadt voted strongly in favour of such a merger, but the people of Basel Landschaft strongly rejected it. Zurich is the canton with the biggest population, with 1'460'000 inhabitants, while the Canton of Appenzell Innerrhoden is the smallest, counting just 16'000 inhabitants. Despite differences in size and population, all cantons are equal in respect of their legal status, with the exception that half-cantons have only one seat in the Council of Cantons (Article 150 Constitution) and count only as half a canton when a majority of the cantons is required for a revision of the Constitution (Article 142 Constitution). The cantons possess all competences which have not been assigned to the federal level (Articles 3 and 42 Constitution), including the implementation of federal law (Article 46 Constitution). They enjoy considerable autonomy in organising themselves and regulating their own affairs; the federal level ensures that the cantons have sufficient financial resources to do so (Article 47 Constitution). Cantons are also able to conclude inter-cantonal agreements between themselves (Article 48 Constitution).[17]
- The third level of government is made up of some 2'290 communes. The number is declining due to an ongoing trend where communes merge in order to carry out tasks more efficiently. As with cantons, the population and size of the communes differs greatly. The Commune of Zurich is the biggest, counting almost 400'000 inhabitants; the Commune of Bister (Canton of Valais) is the smallest, counting only 31 inhabitants. The autonomy of the communes is explicitly guaranteed, although the scope of this autonomy is ultimately determined by the cantons (Article 50 Constitution). Within the limits of their autonomy, the communes organise decision-making in communal matters – such as local taxes, local police, primary education and planning of land use – themselves.

16 The six half-cantons are Appenzell Ausserrhoden and Appenzell Innerrhoden; Basel Stadt and Basel Landschaft; and Obwalden and Nidwalden. They are known as "half-cantons" because they originated from internal divisions in three cantons; Appenzell, Basel and Unterwalden.

17 See, for example, the chapter on Criminal Procedure, p. 399.

Over the last few decades, the federal system has increasingly come under pressure in various ways. First, there has been an ongoing shift of competences from the cantons to the federal level, resulting in an increased burden of responsibilities for the federation.[18] Second, the increasing tendency to take recourse to international treaties often results in a tacit neutralisation of cantonal competences. Various bilateral agreements with the EU are examples of this, such as the harmonisation of the mutual recognition of professional qualifications based on the Agreement on the Free Movement of Persons. Accordingly, consultation and cooperation between the different layers of government is even more important today than in the past, in order to ensure that the cantons can have some influence over the conclusion of treaties which may affect their powers. Third, the principle that all cantons have an equal standing in votes on the revision of the Constitution does not quite fit with the principle that all Swiss citizens are equal and have only one vote. A citizen of the Canton of Uri possesses a voting power which is 35 times weightier than the voting power of a citizen of the Canton of Zurich. As problematic as it might be, this inequality is an inevitable consequence of the deliberate choice to create Switzerland as a federation, consisting of both the people and the cantons.

5. Federal Assembly, Federal Council, Federal Courts

The federal level is organised in order to guarantee the classic principle of the separation of powers between the different branches of government (checks and balances). The composition and functions of the Federal Assembly, the Federal Council (including the federal administration), and the Federal Supreme Court and other federal judicial authorities are as follows:[19]

– The Federal Assembly is the legislature (Articles 148–173 Constitution). It is a bicameral parliament, consisting of the National Council and the Council of States. The National Council has 200 members, representing the people. The seats are allocated to the cantons in proportion to their

18 Haller, n. 65.

19 See for two particularities, namely the right of the people to have the last word on federal acts and international treaties and the Federal Council's organisation as a multi-party collegiate body, pp. 151 and pp. 155.

population. Currently, the Canton of Zurich has 35 seats, while six cantons, including the Canton of Appenzell Innerrhoden, to name but one, have the minimum of one seat. In each canton, the elections operate through the system of proportional representation. The Council of States consists of 46 members, i.e. two delegates from each canton (whereby half-cantons delegate one person), whose role is to represent their cantons. The election of the cantonal delegates is governed by cantonal law; in most cantons, majority voting applies. The term of office for both chambers is four years; re-elections are possible. The two chambers are equal and have similar powers. In particular, both chambers must agree on the enactment of federal acts and the conclusion of international treaties, as well as on the proposed budget. The members of both chambers act together, as the United Federal Assembly, when they elect the members of the Federal Council, the members of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces.

– The Federal Council is the highest governing and executive authority (Articles 174–187 Constitution). It consists of seven members (councillors) who are elected individually by the Federal Assembly for a term of four years. In 2013, the people and the cantons rejected the initiative "popular election of the Federal Council" ("Volkswahl des Bundesrates") which tried to demand that councillors be elected directly by the people. Re-elections are possible and usually occur as a matter of routine; there have only been four instances in which councillors have not been re-elected since 1848.[20] The various geographical and linguistic regions of the country should be appropriately represented, which usually is the case. Moreover, all major political parties are represented, based on a tacit agreement between the major parties.[21] One of the councillors acts as "President of the Confederation", chairing Federal Council meetings and fulfilling representation duties in the country and abroad for a term of one year, acting as *primus* or *prima inter pares* (first among equals). The Federal Council takes its decisions as a collective body, endorsing the principle of collegiality. It directs the federal administration whereby each councillor heads one of the seven Departments (Department of Foreign Affairs; Department of Home Affairs; Department of Justice

20 Haller, n. 300.

21 See pp. 155.

and Police; Department of Defence, Civil Protection and Sport; Department of Finance; Department of Economic Affairs, Education and Research; Department of the Environment, Transport, Energy and Communications). The Federal Council decides on the objectives of government policy, thereby deploying political leadership. It submits drafts of federal acts to the Federal Assembly, enacts ordinances and is responsible for foreign relations.

– The Federal Supreme Court is the supreme judicial authority of Switzerland (Articles 188–191*c* Constitution). Currently, it consists of 38 full-time judges and 19 part-times judges. They are elected by the United Federal Assembly for a term of six years; re-election is possible and, if attempted, is regularly achieved. The court is divided up into seven divisions: two divisions of public law, two divisions of social security law, two divisions of private law, and one division of criminal law. It acts upon appeal, hearing cases which have been decided either by the highest cantonal courts or by other federal courts, i.e. the Federal Criminal Court, the Federal Administrative Court and the Federal Patent Court.[22] The independence of the courts is constitutionally guaranteed.

The members of the Federal Assembly, the Federal Council and the Federal Supreme Court are generally members of political parties. In the Federal Assembly, the most powerful parties are the Swiss People's Party (SVP) with 70 seats, the Social Democratic Party (SPS) with 56 seats, the Liberals (FDP) with 45 seats and the Christian Democratic People's Party (CVP) with 40 seats. These four parties are also represented in the Federal Council.[23] The federal judges are also elected on the basis of party membership. The combination of the judges' party membership with the relatively short term of office of six years for federal judges means that they are under more scrutiny than judges in other jurisdictions, where judges may have longer terms of office but no possibility of facing periodic re-elections.

The city of Bern is the capital of Switzerland. This city is home to numerous official activities: the Federal Assembly meets here, and the official seat of the Federal Council and the departments is also in Bern. The Federal Supreme Court is located in Lausanne, while its two social security law divisions are located in the city of Lucerne.

22 See pp. 156 for the limited extent of constitutional review in Switzerland.

23 See pp. 151.

II. Principles

The Swiss political system is characterised by various particularities which distinguish it from theoretical models of political systems and from those systems which exist in other states. The following particularities are most noteworthy.

1. (Semi-) Direct Democracy

Swiss citizens are regularly called upon to vote on specific political issues. Their decisions are legally binding and cannot be overturned or ignored by state authorities. On the federal level, popular initiatives and referenda are the relevant instruments. Accordingly, the Swiss system is often termed a semi-direct democracy, mixing elements of a representative system with strong direct democratic elements.[24] In addition, the cantons and communes are free to set up their own systems and methods which operate to facilitate the direct participation of the people.

a) Popular Initiative

A popular initiative is an instrument unique to Switzerland: it allows citizens to request a vote on a revision of the Constitution (Articles 138–139*b* Constitution). It requires the approval of a majority of the people who vote and a majority of the cantons in order to be successful.

The right to launch a popular initiative was introduced in 1891. When it was first introduced, 50'000 citizens were required to sign an initiative in order for it to be put to the vote of the people and the cantons. Since then, some limitations have been added: in 1976, the time period within which the required amount of signatures must be collected was circumscribed to 18 months. In 1977, i.e. shortly after women's suffrage had been introduced (as mentioned,

24 See for the societal preconditions upon which the Swiss model of direct democracy depends the chapter on Legal Sociology, pp. 118.

this was not until 1971), the number of signatures was raised to 100'000. The Constitution leaves it to the drafters of an initiative to decide whether to propose a revision in general terms or to submit a specific draft of a provision or several provisions. In practice, specific drafts are the norm. The authors of an initiative are free to choose an appropriate title, as long as it is not misleading. Accordingly, authors tend to label initiatives with lurid titles in order to sell them on the political market. An illustrative example was the initiative "against rip-off" ("gegen die Abzockerei") in 2013 which was approved by the people and the cantons.

The Constitution does not set any hurdles for proposing new provisions, except that peremptory norms of international law must not be violated (ius cogens) and, in the case of a proposal for a partial revision, that the principle of unity of form and subject-matter is respected (Article 139 III Constitution). One example of an initiative which did not meet the former requirement was the initiative entitled "enforcing the expulsion of criminal foreign nationals" ("Zur Durchsetzung der Ausschaffung krimineller Ausländer") of 2016, which demanded a strict implementation of the original initiative of 2010.[25] This initiative was declared partially invalid by the Federal Assembly; although it acknowledged the supremacy of ius cogens over the proposed provisions, it defined ius cogens exhaustively, rather than leaving it to the international community to further develop this concept and include new elements over time.

Traditionally, popular initiatives have been launched by minorities on issues the established political parties do not want to take up in parliament. In recent years, political parties have increasingly begun to take recourse to initiatives themselves, by-passing the classic parliamentary process. Moreover, initiatives can be launched by interest groups to bring a specific concern to the attention of the public, thereby exerting pressure on the political parties to address the issue. The constitution provides for the possibility that the Federal Assembly submits a counter-proposal to an initiative; when this is the case, the committee responsible for the initiative can withdraw it, and only the counter-proposal – considered to be more likely to meet approval – is submitted to the vote of the people and the cantons. The Federal Assembly might also begin efforts to enact a federal act which encompasses the objectives of the initiative (indirect counter-proposal); again, in this case, the committee who launched the initiative might withdraw it.

25 Previously discussed in the section on Foreign Nationals, pp. 142.

The people and the cantons have become more willing to approve popular initiatives over the last fifteen years or so. Out of the 22 initiatives which were approved since the creation of this instrument in 1871, ten were approved of after 2002. Amongst these were various initiatives which were incompatible with international law. This is problematic.[26]

b) Referendum

A referendum allows citizens to vote on a constitutional revision, a federal act or an international treaty (Articles 140–142 Constitution). Two types are provided for:

- A mandatory referendum: this takes places automatically, i.e. without the need for any action from the authorities or the people, in the case of constitutional revisions initiated by the Federal Assembly, accessions to organisations for collective security (e.g. NATO) or to supranational communities (e.g. the EU) and in the case of emergency acts not based on a constitutional provision. Such referenda require the approval of the majority of the people who vote and the majority of the cantons in order to be successful.
- An optional referendum: this can be requested by 50'000 citizens against, in particular, the enactment of a federal act (introduced in 1874) and the conclusion of an international treaty which is of unlimited duration and cannot be terminated, provides for accession to an international organisation, or contains important legislative provisions or requires the enactment of federal legislation for implementation (introduced in 1921, extended in 1977 and 2003). Originally, the necessary number of signatures was 30'000. In 1977, the number was increased to 50'000. The signatures must be collected within 100 days of the official publication of the act or treaty. The people's vote is decisive for the outcome of such a referendum; it is not necessary that a majority of the cantons also approve or reject the act or treaty.

Since 1874, there have been 183 cases where optional referenda have been held, after citizens have successfully collected the necessary number of signatures. In 79 votes, the people agreed to put in force the act or treaty in question; a prominent and to some extent controversial example was the approval

26 See the chapter on International Relations, pp. 177.

in 2002 of an act which legalised abortions during the first 12 weeks of pregnancy (Article 119 Swiss Criminal Code). In 104 votes, the outcome was negative, and the act or treaty was not put into force as originally envisaged by the Federal Assembly: a prominent example was the rejection of the Federal Act on the 2020 Pensions Reform in 2017.

The existence of the referendum in Switzerland modifies the representative system. It is the main instrument of control of, and opposition against, the Federal Assembly. To some extent, providing for the possibility to launch an optional referendum compensates for the lack of a fully-fledged parliamentary opposition.[27] The Federal Assembly creates legislation which takes into account the concerns of as many political parties and stakeholders as possible, thus enhancing the chance that the final product will "survive" a possible referendum. Effectively, the citizens of Switzerland themselves become a key opposition to the Federal Assembly. Considering all of this, it becomes clear why the Swiss "referendum democracy" is often referred to as "consensus-oriented democracy".[28]

c) "Landsgemeinde" as Cantonal Particularity

The cantons choose their own models for the participation of their citizens in the political process. A particularity is provided for in the cantons of Appenzell Innerrhoden and Glarus, which have appointed the Landsgemeinde as their main decision-making body. Once a year, the cantonal citizens eligible to vote gather on the main town square in the respective capitals, Appenzell and Glarus, and decide on all relevant matters, including any revisions of the cantonal Constitutions, the enactment of cantonal laws and issues surrounding elections. Pending issues are openly debated. Votes and elections are held in public; the method of voting is the raising of hands. Usually, the votes are estimated by the chairman or chairwoman. Votes are only actually counted individually in exceptional cases.

From a legal viewpoint, the Landsgemeinde presents various issues. Open voting conflicts with the right to submit a secret vote (Article 34 Constitution). Citizens who are unable to attend – such as elderly or ill people or people with professional commitments – are excluded from exercising their political rights. This is problematic. Still, the Federal Supreme Court held that these

27 Haller, n. 7.

28 Patricia Egli, Introduction to Swiss Constitutional Law, Zurich/St. Gallen 2016, p. 64; Fleiner/Misic/Töpperwien, n. 26, 98; Haller, n. 227.

restrictions do not amount to a violation of the federal Constitution, "in spite of deficiencies inherent in the system".[29]

2. Multi-Party Government

Most European countries adhere to a parliamentary system of government, whereby the prime minister and his or her government depend on Parliament's support.[30] The strongest party selects the prime minister and forms the government, occasionally together with other parties as a coalition, if this is necessary to form a majority.

In Switzerland, a substantially different approach has developed over time. During the first decades of the confederation's existence, the Federal Council was composed only of members of the Liberals (FDP). Towards the end of the 19th century, in the aftermath of the introduction of the referendum and the popular initiative for a partial revision of the Constitution, the pressure to include members of other political parties grew. Therefore, in 1891, the first member of the Christian Democratic People's Party (CVP) was elected to the Federal Council. In 1929, the first member of the Party of Farmers, Traders and Independents (BGB), which was the predecessor of the Swiss People's Party (SVP), became councillor. In 1943, the Social Democratic Party (SPS) was represented in the Federal Council for the first time. Since then, it has been a Swiss particularity that all major political parties are represented in the Federal Council. To this effect, in 1959, the so-called "magic formula" was firmly established in Switzerland. According to this formula, the Federal Council should consist of two members of the Liberals (FDP), the Social Democratic Party (SPS) and the Christian Democratic People's Party (CVP) and of one member of the Swiss People's Party (SVP). The distribution reflected, approximately, the number of seats which the parties usually won in the general elections. In 2003, the formula was slightly modified to reflect changes in the parties' popularity. The Swiss People's Party (SVP) gained one seat; they now have two members in the Federal Council.[31] They gained their extra seat at the detriment of the Christian Democratic People's Party (CVP) which has only had

29 BGE 121 I 138.

30 Haller, n. 238 et seq.

31 This was partly interrupted between 2007 and 2015 when elected members of the SVP chose to leave the party and join a newly founded party, the Conservative Democratic Party (BDP).

one seat since then. Both the Liberals (FDP) and the Social Democratic Party (SPS) still have two seats each.

The magic formula reflects a tacit agreement between the major parties that a collegiate system of a multi-party government best suits the interests of Switzerland. In particular, this practice – where members of all major parties can influence the drafting from the very start – ensures that the Federal Council prepares legislative drafts in a way that they both achieve a majority in the Federal Assembly and also would be likely to "survive" a possible referendum. The collegiate system of a multi-party government is an essential part of the Swiss "concordance democracy"[32].

However, there is no legal obligation on the part of the Federal Assembly to elect councillors according to the magic formula. As such, with each election of a new councillor, the pros and cons of the Swiss model are discussed, and the public watches the resulting commotion in the Federal Palace with fascination. Nevertheless, despite the recurring debate, it seems likely that the magic formula will continue to form the basis for the composition of the Federal Council, although perhaps this composition will more readily adapt to actual developments than was the case in the previous decades.[33]

3. Limited Constitutional Review

Constitutional review – i.e. court review of the compatibility of legal acts and decisions with the Constitution and their power to declare such acts invalid if they are incompatible – is a characteristic of most European legal systems. In Switzerland, however, none of the courts are equipped with this function, at least with respect to federal acts. This is due to Article 190 Constitution, which mandates that the Federal Supreme Court and the other judicial authorities apply the federal acts and international law. Therefore, the courts are obliged to apply federal acts even if they are found to violate the Constitution.

In essence, it is the Federal Assembly which authoritatively interprets the Constitution during the process of enacting federal acts. This includes making an assessment as to whether federal acts are compatible with fundamental rights and whether the Federal Assembly is actually empowered by the Constitution to enact legislation in a specific policy field. This particular

32 Haller, n. 227; Egli, p. 95.

33 See also Fleiner/Misic/Töpperwien, n. 210.

allocation of competence and responsibility is based on a deliberate systemic choice, approved of by the people and the cantons. Attempts to introduce the right of the judiciary to hear cases on the constitutionality of federal acts, for instance by simply deleting Article 190 Constitution, have repeatedly failed to gain enough political support.

Thus, the Federal Assembly becomes the final interpreter of the Constitution. The problematic aspects of this system are clear; the Federal Assembly is not ideally suited, for example, to guarantee fundamental rights, acting as it does through majority voting. However, the Federal Assembly is at least well placed to take its role as final interpreter of the Constitution seriously: it benefits from the advice and assistance of the Federal Council and the legal specialists in the federal administration who prepare drafts and assist in the decision-making process. Notably, it is not easy to point to federal acts which evidently violate the Constitution. Further, the following aspects of the case law of the Federal Supreme Court contribute to minimising the deficiencies of the current system specifically with respect to the protection of fundamental rights:

- The Federal Supreme Court consistently interprets federal acts in light of fundamental rights, thereby adhering to the method of interpreting the law in conformity with the Constitution.[34]
- The Federal Supreme Court does not refrain from pointing to existing incompatibilities if it is not possible to interpret federal acts in conformity with fundamental rights.[35] By doing so, the Federal Supreme Court calls upon the Federal Assembly to remedy the identified deficiencies; it is a method through which the Federal Supreme Court can press the Federal Assembly to at least discuss the issue.
- The Federal Supreme Court accepts cases in which it is called upon to review federal acts in light of the ECHR.[36] The possibility for citizens to directly invoke the rights under this Convention before the Federal Supreme Court somewhat compensates for the lack of constitutional review of federal acts: individuals can request that a federal act which is not compatible with a right guaranteed in the ECHR does not apply.

34 See e.g. BGE 137 I 351.

35 See e.g. BGE 136 I 65.

36 BGE 125 II 417 (PKK); see the chapter on International Relations, p. 177.

The Federal Supreme Court is competent to review the compatibility of cantonal laws and decisions with the federal Constitution. Various *causes célèbres* of the Federal Supreme Court concerned such constellations and have led to the development of an impressive stream of case law on fundamental rights.[37] Indirectly, this case law again influences the law-making process at the federal level; it becomes clearer to the Federal Assembly what the court will regard as constitutionally unacceptable.[38] Moreover, it is possible to challenge decisions based on federal ordinances as to their alleged incompatibility with the federal Constitution and to request their annulment.

37 See pp. 159.
38 Haller, n. 569.

III. Landmark Cases

The Federal Supreme Court has been discussed throughout this chapter; it is the highest court in Switzerland. Although its powers are limited in scope by Article 190 Constitution, which precludes any possibility of constitutional review of federal acts, it takes an active role in protecting fundamental rights, as the following two cases demonstrate.

1. Women's Suffrage

In 1989, Theresa Rohner requested that the cantonal authorities allow her to participate at the Landsgemeinde of the Canton of Appenzell Innerrhoden, in order to exercise her political rights. The cantonal authorities rejected her application, on the basis that Article 16 of the Constitution of the Canton of Appenzell Innerrhoden did not grant political rights to women; only men could vote and participate in elections. In 1990, the Landsgemeinde dealt with a proposal to change the cantonal Constitution, according to which the political rights would have been extended to all Swiss citizens residing in the canton – including women. However, the Landsgemeinde, whose voting population at this time consisted of men alone, rejected the proposal. Several applicants, among them Ursula Baumann and Mario Sonderegger, challenged the decision of the Landsgemeinde. They requested that the Federal Supreme Court annul the decision and oblige the canton to introduce women's suffrage.

Upon appeal, the Federal Supreme Court agreed with the arguments of the applicants.[39] It determined that the exclusion of women from the cantonal electorate violated Article 4 II of the federal Constitution of 1874, an article introduced in 1981 providing for equal treatment of men and women (now: Article 8 II Constitution). The Federal Supreme Court held that the principle of equal treatment also applied to political rights at the cantonal level. Thus, the cantonal practice which did not allow women to participate at the Landsgemeinde violated Article 4 II Constitution 1874. Although Article 74 IV Constitution of 1874

39 BGE 116 Ia 359.

(now: Article 39 I Constitution) provided that it was up to the cantons to regulate the exercise of political rights at the cantonal level, this Article had no effect on the Federal Supreme Court's decision because it did not explicitly provide for an exception from the principle of equal treatment. Consequently, the Canton of Appenzell Innerrhoden was required to allow women to participate at the Landsgemeinde and to exercise the political rights which were provided for in the cantonal law. The Federal Supreme Court concluded that it was possible to interpret Article 16 of the Constitution of the Canton of Appenzell Innerrhoden to this effect; it was not necessary for the canton to formally change its Constitution.

The decision rendered by the Federal Supreme Court ended the long fight of Swiss women (supported by at least some men) for equal treatment regarding political rights. On the federal level, the women had already been granted full political rights in 1971, based on a constitutional revision approved of by a majority of the people – namely, 65 % of the men who turned up to vote – and a majority of the cantons (Article 74 I Constitution 1874, now: Article 136 Constitution). The Canton of Appenzell Innerrhoden was the last canton to follow suit. Irritatingly and somewhat depressingly, the (male) electorate of the canton was not ready to introduce women's suffrage itself. Rather, the Federal Supreme Court needed to step in.

2. Naturalisation and Fundamental Rights

In 2000, the electorate of the Commune of Emmen (Canton of Lucerne) was called upon to decide on 23 applications for naturalisation (comprising 56 foreign nationals, in some cases applying together as families) in a ballot vote. The people voted in favour of the naturalisation of only eight applicants, who were all Italian citizens. They rejected all other applications, which were mainly submitted by citizens of ex-Yugoslavian countries (some of whom had been born in Switzerland and had always lived here). Four of these applicants challenged the negative vote. The cantonal government council, as the first appellate authority, rejected their complaints.

The Federal Supreme Court annulled the decision of the commune on appeal.[40] It held that the electorate is a state organ and exercises a state function when it decides on the naturalisation of foreign nationals and thus on their legal status. Therefore, the electorate is obliged to respect fundamental rights (Article 35 Constitution). In particular, the prohibition of discrimination

40 BGE 129 I 217.

applies (Article 8 II Constitution). On the basis of how the electorate decided – naturalisation of all Italian applicants, no naturalisation of all applicants from ex-Yugoslavian countries without evident relevant differences between the applicants – and publications that had been circulated in the run-up to the vote (flyers and letters to newspapers calling out to reject the applications of persons from ex-Yugoslavian countries), the Federal Supreme Court decided that the constitutional prohibition of discrimination on the grounds of origin had been violated. Moreover, it held that the right to be heard applies; negative decisions must be backed up with adequate reasoning (Article 29 II Constitution). This right to be heard is violated per se in cases in which the electorate decides on naturalisation applications in a secret ballot vote, as here it is logically impossible to deliver a proper justification for a negative decision. As such, it is no longer permissible to decide on naturalisations through ballot voting.

Most commentators have welcomed the Federal Supreme Court's judgment, and rightly so. In a series of later cases, the Federal Supreme Court has further clarified the guidelines. It acknowledged that decisions on the naturalisation of foreign nationals may still be taken by the communal electorate if this is considered by the commune to be the appropriate forum; however, the decision-making process must respect fundamental rights. The most obvious rights which must be respected in such a process are the prohibition of discrimination (Article 8 II Constitution), the prohibition of arbitrariness (Article 9 Constitution), the right to privacy (Article 13 Constitution), the freedom of religion and conscience (Article 15 Constitution) and the right to be heard (Article 29 II Constitution).[41] Today, a significant number of communal electorates retain the competence to decide on the naturalisation of foreign nationals; the figure has been estimated at approximately 800 communes.

Not everyone was satisfied with the Federal Supreme Court's judgement: in 2008, the Swiss People's Party (SVP) tried to turn back the wheel. It collected the necessary 100'000 signatures for a popular initiative entitled "for democratic naturalisations" ("für demokratische Einbürgerungen") according to which it would have been entirely up to the communes to decide on the decision-making process for naturalisations, thus allowing secret ballot voting to be reinstated. The people and the cantons overwhelmingly rejected the initiative (63 % voting against). Instead, the Federal Assembly codified the basic elements of the Federal Supreme Court's case law in the Federal Act on the Swiss Citizenship (Articles 15–17).

41 See e.g. BGE 129 I 232; BGE 130 I 140; BEG 135 I 49; BGE 139 I 169.

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